STATE OF MICHIGAN

COURT OF APPEALS

JOHN DRUMM,

Plaintiff-Appellant,

v

BIRMINGHAM PLACE, d/b/a PAUL H. JOHNSON, INC., and LOUISE GOLDSTEIN,

Defendants-Appellees.

UNPUBLISHED
March 22, 2005

No. 252223
Oakland Circuit Court
LC No. 2003-047021-NO

Before: Owens, P.J., and Sawyer and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant Birmingham Place in this premises liability case. Plaintiff also raises issues from an earlier order granting summary disposition in favor of defendant Goldstein. We affirm in part, reverse in part and remand.

On appeal plaintiff first argues that the trial court erred in finding that the oily condition on which he fell was open and obvious as a matter of law. We agree.

"[T]his Court applies a de novo standard when reviewing motions for summary disposition made under MCR 2.116(C)(10), which tests the factual support for a claim." *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In evaluating a motion under MCR 2.116(C)(10), "a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*.

> To establish a prima facie case of negligence, a plaintiff must prove: (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach caused the plaintiff's injuries, and (4) the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). With regard to the first element, the duty owed to a visitor by a landowner depends on whether the visitor is classified as a trespasser, licensee, or invitee. [*Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 60; 680 NW2d 50 (2004).]

"In general, a premises possessor owes a duty to an invitee[1] to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. However, this duty does not generally encompass removal of open and obvious dangers . . . ." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001) (citation omitted; footnote added). The Supreme Court has made it clear, however, that "even though invitors have a duty to exercise reasonable care in protecting their invitees, they are not absolute insurers of the safety of their invitees." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). Where a potentially dangerous condition is open and obvious, there is no reason to foresee that average users encountering the condition would not take appropriate precautions in dealing with the condition. *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 18; 643 NW2d 212 (2002). "Where the events leading to injury are not foreseeable, there is no duty, and summary disposition is appropriate." *Johnson v City of Detroit*, 457 Mich 695, 711; 579 NW2d 895 (1998).

> The test to determine if a danger is open and obvious is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Because the test is objective, this Court "look[s] not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997). [*Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002).]

In the present case, plaintiff testified that he was looking forward and down while he was walking but he was unable to discover the oil spot because it was covered with a granular compound that made the area look identical to the rest of the parking garage floor, which was covered with road salt residue. Gary Baun, a principal at the law firm where plaintiff worked who also parked on the lower level of the parking garage, testified that he also slipped in the same area and he was also unable to see any oil spots. Additionally, Baun testified that the painted concrete floor prevented him from seeing the granules that were put down to clean up the oil spots.

The description of the absorbent granules was very similar to salt residue that may have been brought in by the cars in the garage. The fact that these granules may crunch under foot is not inconsistent with salt. The fact that Walter Toepler, a maintenance person for the parking garage who was familiar with this absorbent compound, believed he could see it on the floor from "probably more" than three feet away is not an indication that an average user would be able to discover them on casual inspection. A man of average height would be nearly twice that distance away from the substance while standing directly over it. Moreover, even if one were able to see the granules on the floor before stepping on them, unless one were familiar with their

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[1] Defendant Birmingham Place concedes that plaintiff is an invitee.

purpose, there is no indication that a potentially dangerous condition would lie beneath them. There were no signs or cones placed near defendant Goldstein's parking space to indicate a substance had been put down to clean up oil spots on the floor. In sum, there does not appear to be anything that would put an average user on notice that a slippery oil spot laid beneath the beige granules on the floor.

The trial court's reliance on pictures of defendant Goldstein's parking space taken several days after plaintiff fell is misplaced. Plaintiff testified that people regularly walked through defendant Goldstein's parking space on their way to the elevators. Moreover, the parking garage floor is cleaned with a power sweeper two to three times per week. It is entirely possible that the granules plaintiff claims were covering the oil spots in defendant Goldstein's parking space were no longer there when these pictures were taken, making the oil spots much more readily apparent than they were at the time of plaintiff's injury. Relying on such pictures fails to view the evidence in a light most favorable to plaintiff and is, therefore, improper. Viewing the evidence in a light most favorable to plaintiff, a reasonable jury could disagree on whether an average user would have been able to discover the oily condition on casual inspection at the time of his injury.

Plaintiff also argues that the trial court erred in finding that defendant Goldstein owed no duty to him. We disagree. Whether Goldstein owed a duty to plaintiff is a question of law. This Court reviews questions of law de novo. *Fultz v Union-Commerce Associates*, 470 Mich 460, 463; 683 NW2d 587 (2004). This Court, in *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998), set out the standards of a negligence claim:

> A cause of action for negligence requires that the plaintiff demonstrate that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached the duty, (3) the defendant's breach of the duty proximately caused the plaintiff's injuries, and (4) the plaintiff suffered damages. *Richardson v Michigan Humane Society*, 221 Mich App 526, 528; 561 NW2d 873 (1997). Duty is an obligation to conform to a specific standard of care toward another as recognized under the law. *Halbrook v Honda Motor Co, Ltd*, 224 Mich App 437, 440-441; 569 NW2d 836 (1997).

There are a number of factors to look to to determine if a duty exists:

> "In determining whether a duty exists, courts look to different variables, including the (1) foreseeability of the harm, (2) degree of certainty of injury, (3) existence of a relationship between the parties involved, (4) closeness of connection between the conduct and injury, (5) moral blame attached to the conduct, (6) policy of preventing future harm, and (7) the burdens and consequences of imposing a duty and the resulting liability for breach. . . ."
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> "The mere fact that an event may be foreseeable is insufficient to impose a duty upon the defendant"; rather, the question is whether, in light of all the relevant evidence, "the defendant is under any obligation for the benefit of the particular plaintiff . . . ." [*Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 14-15; 596 NW2d 620 (1999), quoting *Terry v Detroit*, 226 Mich App 418, 424-425; 573 NW2d 348 (1997).]

"Whether defendant acted with reasonable care is the standard for liability, not the test for determining whether a duty exists." *Cipri, supra* at 15.

A duty of care

> "may arise specifically by mandate of statute, or it may arise generally by operation of law under application of the basic rule of the common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his action as not to unreasonably endanger the person or property of others. [*Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967).]"

> "Such duty of care may be a specific duty owing to the plaintiff by the defendant, or it may be a general one owed by the defendant to the public, of which the plaintiff is a part." [*Cipri, supra* at 15.]

"[E]very person is under the general duty to so act, or to use that which he controls, as not to injure another." *Johnson v A & M Custom Built Homes of West Bloomfield, LPC*, 261 Mich App 719, 722; 683 NW2d 229 (2004). However, " 'premises liability is conditioned upon the presence of both possession and control over the land' " because the person having such possession and control is " 'normally best able to prevent . . . harm to others.' " *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 705; 644 NW2d 779 (2002).

In this case, Goldstein was not in the best position to prevent harm to others because she did not retain possession or control of her parking space, rather, Birmingham Place did. When Goldstein's car was not parked in her assigned space, nothing prevented other cars from parking there and leaking oil. Additionally, Goldstein was not responsible for cleaning and maintaining the parking garage floor beneath her parking space, rather, Birmingham Place was, as evidenced by its maintenance personnel's duties in putting down the oil-absorbing granules and power sweeping and power washing the floor.

Moreover, evaluating the seven factors in *Cipri, supra*, it does not appear that a duty should be imposed on defendant Goldstein in this case. First, it is not entirely foreseeable that someone would not see an oil spot on a parking garage floor and take steps to avoid injury. It was, after all, the granules put down by defendant Birmingham Place that prevented plaintiff from seeing the oil spot. Second, it is not certain that someone who momentarily loses his balance, like plaintiff, will sustain injury. Third, there is no relationship whatsoever between defendant Goldstein and plaintiff that would justify the imposition of a duty. Fourth, defendant Goldstein's alleged failure to prevent her vehicle from leaking fluids on the parking garage floor is not that closely connected with plaintiff's injury because: (1) other vehicles may have leaked the oil that plaintiff slipped on; (2) but for the oil-absorbing granules, plaintiff would have seen the oil spot and avoided; and (3) there was a clearly designated walkway immediately beside defendant Goldstein's parking space that plaintiff could have walked on.

Fifth, even if defendant Goldstein's vehicle was leaking fluids onto her parking space and she failed to realize it, her conduct would not rise to the level of moral blameworthiness because it is in no way malicious. Sixth, while preventing future harm is always a concern, this burden would be better placed on the party who retained control over the parking space by perhaps

posting a sign notifying users of the garage when the granules are placed on the floor to clean up oil spots. Seventh, the burden of imposing a duty on defendant Goldstein in this case would be great because it would require her to police her parking space to make sure not only that other cars did not park there, but also to monitor which cars might be leaking fluids. In this case, the trial court properly determined that no duty should be imposed on defendant Goldstein toward plaintiff.

The order granting summary disposition in favor of defendant Goldstein is affirmed. The order granting summary disposition in favor of defendant Birmingham Place is reversed and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Helene N. White